

United States Courts
Southern District of Texas
FILED

APR 14 2005

BD

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN SPIEGELBERG,
d/b/a RED RAIDER OUTFITTER
Plaintiff,

v.

COLLEGIATE LICENSING COMPANY,
Defendant.

§
§
§
§
§
§
§
§

H - 05 - 1264

CIVIL ACTION No. _____
5 - 05 CV 0276 - C

ORIGINAL COMPLAINT

Plaintiff John Spiegelberg d/b/a Red Raider Outfitter (hereafter, "Plaintiff RRO"), by and through its attorney(s), files this Original Complaint against Defendant Collegiate Licensing Company (hereafter, "Defendant CLC"), and allege as follows:

I.

Parties

1. Plaintiff RRO is a sole proprietorship of John Spiegelberg, who is a U.S. citizen and resident of Lubbock, Texas. Both of Plaintiff RRO's places of business are in Lubbock, Texas, and its principal place of business is 2416 Broadway, Lubbock, Texas 79401.
2. Defendant CLC, based on information and belief to be a Georgia corporation, has a principal place of business is 290 Interstate North Cir. SE Street, Atlanta, Georgia 30339.

II.

Jurisdiction and Venue

3. This action arises under the Jurisdiction is pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, for Non-Infringement, *inter alia*, of one or more trademarks owned by Texas Tech University, through the Lanham (Trademark) Act, 15 U.S.C. §§ 1114 *et seq.*, and further through 28 U.S.C. §§ 1331, 1367.

4. Venue is proper under 28 U.S.C. §§ 1391 (b), (c) and/or 28 U.S.C. § 1392 because Defendant CLC, a corporation, resides in this judicial district because it is subject to personal jurisdiction of this judicial district's courts, is found in this judicial district, and/or involves property located in different judicial districts within Texas.

III.

Facts and Allegations Common to All Counts

5. Defendant CLC is an authorized agent for Texas Tech University ("TTU") in regards to licensing, protecting, and enforcing TTU's marks.

6. Based on information and belief, as well as Defendant CLC's website (www.clc.com), in this judicial district, Defendant CLC is an authorized agent, in any respect, for the following schools: Rice University, Sam Houston State University, University of Houston, University of Texas – Brownsville, University of Texas – Pan American, University of Texas – UTHSC/Houston, and University of Texas Medical Branch at Galveston.

7. Based on information and belief, Defendant CLC is an authorized agent for Texas Tech University (“TTU”) in regards to licensing, protecting, and enforcing TTU’s marks used on goods and services associated with such marks and sold in this judicial district.
8. Based on information and belief, in this judicial district, Defendant CLC has conducted business for itself and/or as an agent for any of the schools named in paragraphs 5 and/or 6.
9. Based on information and belief, in this judicial district, Defendant CLC conducts business for itself and/or as an agent for any of the schools named in paragraphs 5 and/or 6.
10. In this judicial district, TTU offers distance learning courses to others via the World Wide Web and/or Internet as found at www.dce.ttu.edu.
11. In this judicial district, TTU mark and/or alleged marks are used on goods and services sold to others.
12. Defendant CLC has accused Plaintiff RRO of using federal and state marks of TTU in violation of state and federal laws.
13. Defendant CLC has accused Plaintiff RRO of using, without authorization, marks of TTU, wherein such use constitutes trademark infringement, unfair competition, and dilution.

14. A comic strip character named Red Ryder existed before TTU's use of the alleged RED RAIDER character mark, Reg. No. 2433675.

IV.

Claims for Relief

Count I – Declaratory Judgment for No Trademark Infringement

15. Re-alleging and incorporating by this reference paragraphs 1-14 for all of this Court I, an actual controversy exists between Defendant CLC and Plaintiff RRO as to non-infringement, under 15 U.S.C. § 1114, of TTU's alleged RED RAIDER character mark, Reg. No. 2433675, which is subject to a pending Petition for Cancellation before the Trademark Trial and Appeal Board. Defendant CLC has created a reasonable apprehension on the part of Plaintiff RRO that it will face an trademark infringement suit if Plaintiff RRO continues to make and sell it goods and/or services of which Defendant CLC complains by written letter to Plaintiff RRO.

16. Plaintiff RRO's goods and/or services do not infringe of TTU's alleged RED RAIDER character mark, Reg. No. 2433675, over which Defendant CLC exerts its alleged, authorized rights to license, protect and enforce on behalf of TTU. Plaintiff RRO seeks a declaratory judgment that its goods and services do not infringe TTU's alleged RED RAIDER character mark, Reg. No. 2433675.

17. Plaintiff RRO asserts that this is an exceptional case such that Defendant CLC should be required to pay Plaintiff RRO's reasonable attorney fees and costs in accordance with 15 U.S.C. § 1117.

Count II – Declaratory Judgment for No Federal and State Unfair Competition

18. Re-alleging and incorporating by this reference paragraphs 1-14 for all of this Court II, an actual controversy exists between Defendant CLC and Plaintiff RRO as to federal unfair competition, *i.e.*, 15 U.S.C. § 1125 (a)(1), and similarly under state law, if existing, of TTU's alleged RED RAIDER character mark, Reg. No. 2433675, which is subject to a pending Petition for Cancellation before the Trademark Trial and Appeal Board. Defendant CLC has created a reasonable apprehension on the part of Plaintiff RRO that it will face a federal and state unfair competition suit based on false licensing, sponsorship, or authorization if Plaintiff RRO continues to make and sell its goods and/or services of which Defendant CLC complains by written letter to Plaintiff RRO.

19. Plaintiff RRO's goods and/or services do not unfairly compete in regards to TTU's alleged RED RAIDER character mark, Reg. No. 2433675, over which Defendant CLC exerts its alleged, authorized rights to license, protect and enforce on behalf of TTU. Plaintiff RRO seeks a declaratory judgment that its goods and services do not unfairly compete under federal and state law in regards to this alleged RED RAIDER character mark, Reg. No. 2433675.

20. Plaintiff RRO asserts that this is an exceptional case such that Defendant CLC should be required to pay Plaintiff RRO's reasonable attorney fees and costs in accordance with 15 U.S.C. § 1117.

Count III – Declaratory Judgment for No Federal and State Dilution

21. Re-alleging and incorporating by this reference paragraphs 1-14 for all of this Court III, an actual controversy exists between Defendant CLC and Plaintiff RRO as to federal dilution, i.e., 15 U.S.C. § 1125 (c), and Texas anti-dilution, *i.e.*, Tex. Bus. & Com. Code § 16.29, of TTU's alleged RED RAIDER character mark, Reg. No. 2433675, which is subject to a pending Petition for Cancellation before the Trademark Trial and Appeal Board. Defendant CLC has created a reasonable apprehension on the part of Plaintiff RRO that it will face a dilution suit if Plaintiff RRO continues to make and sell its goods and/or services of which Defendant CLC complains by written letter to Plaintiff RRO.

22. Plaintiff RRO's goods and/or services do not dilute TTU's alleged RED RAIDER character mark, Reg. No. 2433675, over which Defendant CLC exerts its alleged, authorized rights to license, protect and enforce on behalf of TTU. Plaintiff RRO seeks a declaratory judgment that its goods and services do not constitute federal and state dilution in regards to this alleged RED RAIDER character mark, Reg. No. 2433675.

23. Plaintiff RRO asserts that this is an exceptional case such that Defendant CLC should be required to pay Plaintiff RRO's reasonable attorney fees and costs in accordance with 15 U.S.C. § 1117.

VI.

Prayer

Plaintiff RRO requests a judgment from the Court that includes:

- I. Plaintiff RRO's has not infringed TTU's alleged RED RAIDERS character mark, Reg. No. 2433675;
- II. Plaintiff RRO has not engaged in any unfair competition under federal and state law in regards to TTU's alleged RED RAIDERS character mark, Reg. No. 2433675;
- III. Plaintiff RRO has not diluted, under federal and state law, TTU's alleged RED RAIDERS character mark, Reg. No. 2433675;
- IV. An award of costs and any damages to Plaintiff RRO;
- V. A declaration of an exceptional case that requires Defendant CLC to pay Plaintiff RRO's reasonable attorney fees; and
- VI. Additional relief, at law or equity, available to Plaintiff RRO that this Court deems just, reasonable and proper.

Respectfully submitted,

Dated: April 14, 2005

By: Erik J. Osterrieder
Erik J. Osterrieder, Attorney-in-Charge
Tex. Bar No.: 24013276
S. D. Tex. No.: 24165
Schubert Osterrieder & Nickelson PLLC
6013 Cannon Mtn. Dr., S14
Austin, Texas 78749
(713) 533-0494
(512) 301-7301 (fax)

JS 44 (Rev 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

John Spiegelberg d/b/a Red Raider Outfitter

(b) County of Residence of First Listed Plaintiff Lubbock Co., TX
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Erik J. Osterrieder, Schubert Osterrieder & Nickelson PLLC,
6013 Cannon Mtn. Dr., S14, Austin, TX 78749 (713) 533-0494

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

United States Court of Appeals
Southern District of Texas
FILEDAPR 14 2005
Collegiate Licensing CompanyCounty of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY) Fulton Co., GANOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVEDMichael N. Milby, Clerk of Court
Attorneys (List up to two)

H-05 - 1264

III. CITIZENSHIP OF PRINCIPAL PARTIES

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 2	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 5
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 3	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 6
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 4	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 7

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 420 Commerce
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 450 Deportation	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 470 Racketeers Influenced and Corrupt Organizations	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 490 Other Statutory Actions
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 510 Selective Service	<input type="checkbox"/> 510 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 550 Securities/Commodities/ Exchange	<input type="checkbox"/> 550 Securities/Commodities/ Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 390 Other	<input type="checkbox"/> 570 Customer Challenge 12 USC 3410	<input type="checkbox"/> 570 Customer Challenge 12 USC 3410
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 580 Black Lung (923)	<input type="checkbox"/> 580 Black Lung (923)
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 583 DIWC/DIWW (405(g))	<input type="checkbox"/> 583 DIWC/DIWW (405(g))
<input type="checkbox"/> 196 Franchise		<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 584 SSID Title XVI	<input type="checkbox"/> 584 SSID Title XVI
		<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 585 RSI (405(g))	<input type="checkbox"/> 585 RSI (405(g))
		<input type="checkbox"/> 750 Other Labor Litigation	<input type="checkbox"/> 760 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 760 Taxes (U.S. Plaintiff or Defendant)
		<input type="checkbox"/> 791 Emp. Ret. Inc. Security Act	<input type="checkbox"/> 780 Other	<input type="checkbox"/> 780 Other
			<input type="checkbox"/> 791 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 791 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 810 Economic Stabilization Act
				<input type="checkbox"/> 820 Environmental Matters
				<input type="checkbox"/> 830 Energy Allocation Act
				<input type="checkbox"/> 840 Freedom of Information Act
				<input type="checkbox"/> 850 State Statutes
				<input type="checkbox"/> 860 Customer Challenge 12 USC 3410
				<input type="checkbox"/> 870 Other Statutory Actions
				<input type="checkbox"/> 880 Agricultural Acts
				<input type="checkbox"/> 890 Economic Stabilization Act
				<input type="checkbox"/> 892 Environmental Matters
				<input type="checkbox"/> 894 Energy Allocation Act
				<input type="checkbox"/> 895 Freedom of Information Act
				<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
				<input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

<input type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
--	---	--	---	--	---	--

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity)
Lanham (Trademark) Act at 15 U.S.C. §§ 1114 et seq.Brief description of cause:
Declaratory Judgment for non-infringement, no state/federal unfair competition, no state/federal dilution

VII. REQUESTED IN COMPLAINT:

 CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions)

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

04/14/2005

Erik J. Osterrieder

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFF JUDGE MAG JUDGE